Supreme Court, U.S.
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No.

In the Supreme Court of the United States

KEITH WINSTON WATTERS
TA KEITH WATTERS AND ASSOCIATES,
Petitioner,

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY TA WMATA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether sovereign immunity under the eleventh amendment is a bar to a suit for just compensation for a taking under the fifth amendment.

Parties to the Proceeding and Corporate Disclosure Statement

Petitioner

Petitioner is Keith Winston Watters, an individual citizen of the United States, residing in District of Columbia. Petitioner has no corporate affiliations. Keith Winston Watters is an attorney licensed to practice law in the District of Columbia, and in that capacity was Plaintiff in the District Court and Appellee in the Circuit Court of Appeals for the District of Columbia Circuit.

Respondent

Washington Metropolitan Area Transit Authority (WMATA) is a quasi-govermental authority of Maryland, Virginia and the District of Columbia created by interstate compact as authorized by Congress through Public Law Number 89-774 (80 Stat. 1324, 1350 (1966)), to operate a regional transportation system of buses and trains. Respondent WMATA was the Defendant in the District Court and the Appellant before the Circuit Court of Appeals for the District of Columbia Circuit.

Other Parties

Brenda Blocker is an individual citizen of the United States, residing in the District of Columbia. Brenda Blocker has no corporate affiliations. Brenda Blocker was interpleaded by Defendant WMATA as Third Party Defendant in the District Court and was an Appellee in the Circuit Court of Appeals for the District of Columbia Circuit.

Bonita Rudd is an individual citizen of the United States, residing in the District of Columbia. Bonita Rudd has no corporate affiliations. Bonita Rudd was an attorney licensed to practice law in the District of Columbia and in that capacity was interpleaded by Defendant WMATA as Third Party Defendant in the District Court and was an Appellee in the Circuit Court of Appeals for the District of Columbia Circuit.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceeding and Corporate Disclosure Statement ii

Table of Contents iv

Table of Cited Authorities vi

Table of Appendices x

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

Facts of the Case 3

Reasons For Granting the Petition 6

(1) The Circuit Court's Reversal of the District Court's Factual Finding on WMATA's claimed Sovereign Immunity Conflicts with Decisions of the United States Supreme Court and this Circuit. 7

(2) Sovereign Immunity does not Bar a Fifth Amendment Action for Destruction of an Equitable Lien 9

(3) Defendant WMATA Is Liable Under Tort For The Amount of Plaintiff's Lien 13

TABLE OF CITED AUTHORITIES

Cases:

Armstrong v. United States,
364 U.S. 40 (1960) 6, 12, 15

Beatty v. WMATA,
860 F. 2d 1117 (D.C. Cir 1988) 8

Berkovitz v. United States,
486 U.S. 531 (1988) 7

Camp v. Boyd,
229 U.S. 530 (1913) 11

Clark v. Barnard,
108 U.S. 436 (1883) 8, 9

College Savings Bank v. Florida,
527 U.S. 666 (1999) 6, 8, 9

DeWinter v. Thomas,
34 D.C. App. 80 (1909) 11

District of Columbia Redevelopment Land Agency v. Dowdey,
618 A.2d 133 (D.C. 1992) 9, 13

Dowdey v. R.L.A.,
619 A.2d 153 (D.C. 1992) 14

Elam v. Monarch Life Ins. Co.,
598 A.2d 1167 (D.C. 1991) 10, 12

Falcone v. Hall,
235 F.2d 860 (D.C. Cir. 1956) 13, 14

Friedman v. Harris,
158 F.2d 187 (D.C. Cir. 1946) 13, 14

Gillot v. WMATA,
507 F. Supp. 454 (D. D.C. 1981) 8

Great Northern Life Insurance Co. v. Read,
322 U.S. 47 (1944) 9

Greenberg v. Sher,
367 A2d 882 (D.C. 1989) 14

Gunter v. Atlantic Coast Line Rail Company,
200 U.S. 273 (1906) 9

Humphrey v. Pegues,
83 U.S.(16 Wall) 244 (1872) 8

Idaho v. Couer d'Alene Tribe,
521 U.S. 261 (1997) 9

Ingersoll v. Coram,
211 U.S. 335 (1908) 12

Kaushiva v. Hutter,
454 A.2d 1373 (D.C. 1983) 14

Lapides v. Board of Regents,
535 U.S. _____,
122 S.Ct. 1640 (2002) 6, 8, 9, 12

Missouri v. Fiske,
290 U.S. 18 at 24 (1933) 8

Montgomery v. Maryland,
535 U.S. Order List 01-1079 (May 20, 2002) . . 15

Petty v. Tennessee-Missouri Bridge Commission,
359 U.S. 275 (1959) 6, 8

Pink v. Farrington,
67 D.C. App. 314 (1937) 11, 12

Quern v. Jordan,
440 U.S. 332, 99 S.Ct. 1139,
59 L.Ed. 358 (1970) 3

Richardson v. Fajardo Sugar,
241 U.S. 44 (1916) 2

Sachs v. Klein,
154 A.2d 134 (D.C. 1959) 14

Shaw v. Railroad Co.,
101 U.S. 557 (1880) 8

Souders v. WMATA,
48 F. 2d 546 (D.C. Cir. 1995) 8

Travelers Ins. Co. v. Haden,
418 A. 2d 1078 (D.C. 1980) 14

Union Pac. R.R. Co. v. Laughlin,
247 U.S. 204 (1918) 14

United States v. 88.28 Acres of Land,
608 F.2d 708 (7th Cir. 1979) 13

United States v. Gaubert,
499 U.S. 315 (1991) 7, 8

Wardman v. Leopold,
85 F.2d 277 (D.C. Cir. 1936) 12

Wisconsin Department of Corrections v. Schacht,
524 U.S. 381 (1998) 2, 9

WMATA v. Reid,
666 A. 2d 41 (D.C. 1995) 15

Wylie v. Coxe,
15 How. 415 (1853) 12

Constitutional Provisions:

United States Constitution Article 1, § 8, clause 4 3

United States Constitution
Fifth Amendment . . . . . i, 1, 6, 9, 12, 14, 15

United States Constitution
Eleventh Amendment . . . . . i, 2, 6, 9

Statutes:

28 U.S.C. § 1254(1) 1

9 D.C. Code 1107.01 1

Other Authorities:

Compact between Maryland and Virginia,
Pub. L. No. 89-774, 80 Stat. 1324 (1966) 3

Forkosch, *Prima Facie Tort* 42
Cornell Law Quarterly 465 (1957) 14

Halpern, *Intentional Torts and the Restatement*
7 Buffalo Law Review 7 (1957) 14

Prosser on Torts 4th ed. 616 *Misfeasance* 14

WMATA Compact Section 12 . . . . . 3, 7

WMATA Compact Section 80 . . . . . 1, 7, 8

Table of Appendices

A. U.S. Court of Appeals Order Denying Rehearing 1a-2a

B. U.S. Court of Appeals Opinion 3a-12a

C. U.S. District Court Memorandum Opinion 13a-23a

D. U.S. District Court Judgment Order for Petitioner 24a-25a

Opinions Below

The District Court's memorandum opinion (Bryant, J.) granting judgment to petitioner in this case (Appendix C pp. 13a-23a) and District Court Order of Judgment (Appendix D pp. 24a-25a) are not as yet published. The Court of Appeals opinion (Garland, J.) reversing the district court (Appendix B pp. 3a-12a) and the order denying rehearing en banc (Appendix A pp. 1a-2a) are not as yet published.

Statement of Jurisdiction

The Court of Appeals entered its opinion on July 12, 2002, and subsequently denied rehearing and rehearing en banc on August 6, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1254(1).

Constitutional and Statutory Provisions Involved

U.S. Const. Art. V. provides, in relevant part:

> No person shall be . . . deprived of life liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Washington Metropolitan Area Transit Authority Compact (Pub. L. No. 89-774, 80 Stat. 1324 (November 6, 1966) is codified at 9 D.C. Code 1107.01) Section 80 provides in relevant part:

> The Authority shall be liable for its contracts and for its torts . . . committed in the conduct of any proprietary function, in accordance with the law . . . , but shall not be liable for

any torts occurring in the performance of a governmental function.

Statement of the Case

In the instant case plaintiff perfected his lien in the settlement proceeds by giving timely notice. WMATA did not reject plaintiff's lien or seek to interplead the funds and therefore the lien attached to the proceeds once the parties settled the case. WMATA's intentional failure to follow its own procedure constituted destruction of an equitable lien. WMATA therefore is liable for a taking under tort to plaintiff in an amount equal to one-third of the amount of the settlement of said case. Petition Appendix D, page 24a

Plaintiff Keith W. Watters, an attorney (hereinafter "plaintiff") brought suit against Washington Metropolitan Area Transit Authority (herein "WMATA" or "Tortfeasor") in the Superior Court of the District of Columbia alleging one contract claim and one claim sounding in tort for destruction of an attorney's lien. WMATA invoked the jurisdiction of the federal court by Removal though it could have litigated its claims in Superior Court. Petition Appendix B, page 11a footnote 13 J.A. 54. WMATA failed to plead sovereign immunity[1] in its Answer and Amended Answer, but raised the issue of governmental function exception to waiver in its motions for summary judgment. Plaintiff Watters countered

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[1] A unanimous Court ruled that Puerto Rico waived its sovereign immunity claim by failing to plead immunity in its Answer or Amended Answer. *Richardson v. Fajardo Sugar*, 241 U.S. 44 at 47 (1916). See also Justice Kennedy's concurring opinion suggesting a court should infer waiver from a failure to raise the Eleventh Amendment objection at the outset of the proceeding. *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381 at 395 (1998)

the summary judgment motions by raising the issue of statutory waiver. WMATA based its claim of sovereign immunity on the governmental function exception to its waiver under the WMATA Compact[2] Section 12. The District Court rejected WMATA's claim of sovereign immunity. At trial the District Court dismissed Plaintiff's contract claim but allowed the tort claim of breach of duty to enforce an equitable lien. After Judgment for the Plaintiff WMATA brought an appeal. The Circuit Court's holding, *sub silentio,* that WMATA's claim of sovereign immunity based upon the *governmental function* exception to the waiver was not well founded and conflicts with the decisions of the Supreme Court.

Facts of the Case

1. Keith W. Watters entered into a Retainer Agreement with Brenda Blocker, wherein the plaintiff agreed to provide Blocker with legal representation in the District of Columbia in connection with defendant Blocker's claim for damages against the Washington Metropolitan Area Transit Authority stemming from injuries defendant Blocker sustained while a passenger on a bus owned and operated by WMATA. J.A. 184

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[2] Congress approved the Compact between Maryland and Virginia and enacted it for the District of Columbia on November 6, 1966. Pub. L. No. 89-774, 80 Stat. 1324 (1966). By virtue of Article 1, § 8, clause 4 of the United States Constitution, the states have granted Congress the power to waive sovereign immunity to suit if it (Congress) does so expressly by clear language that the immunity was swept away or through clear implication drawn from legislative consideration or legislative history. *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed. 358 (1970). WMATA Compact Section 12 makes statutory waiver clear.

2. Pursuant to the aforementioned contract, Blocker promised to pay the plaintiff a fee equal to one third of the total amount recovered from WMATA, whether by way of settlement, judgment, or otherwise. Blocker also promised to pay to the plaintiff, all filing fees, other costs, and out-of-pocket expenses (including long distance telephone calls, photograph charges, etc.) incurred or paid in connection with her claim for damages against WMATA.

3. During the pendency of the aforementioned civil action, the plaintiff and WMATA, through its agent and employee attorney David Dulansey, actively and in good faith conducted settlement negotiations in an attempt to settle Blocker's claim for damages. The plaintiff promptly conveyed all settlement offers to Blocker.

4. At a settlement conference before the Magistrate Judge, WMATA informed the plaintiff that he was "certain" he could obtain the sum of Fifty-Five Thousand Dollars to settle Blocker's claim. The plaintiff promptly conveyed this offer to the client along with his recommendation that she accept the settlement offer.

5. Shortly after the aforementioned settlement offer was conveyed the plaintiff was discharged without cause from further representation in connection with her claim.

6. Blocker had retained another attorney to represent her in her claim for damages against WMATA. J.A. 185

7. Plaintiff timely asserted his attorney's lien. J.A. 183 Subsequently WMATA approved settlement of the case. J.A. 190

8. After the aforementioned notice of lien, Blocker accepted the offer and settled her claim. J.A. 190

9. WMATA intentionally failed to contact the plaintiff to inform him of the settlement. J.A. 164 This action was in spite of a written proprietary policy of WMATA for handling liens. J.A. 135 WMATA was aware of its common law obligation concerning attorney's liens. J.A. 162 WMATA routinely followed the common law by placing the attorney(s) name(s) on disbursement checks. J.A. 192

10. On April 22, 1992 defendant WMATA intentionally disbursed the proceeds from the settlement without segregation of the lien amount as required by law, thereby tortiously breaching its obligation to plaintiff under the common law and destroying the lien. J.A. 135-37, 192

11. Despite having had proper and timely notice of plaintiff's lien WMATA failed to honor the terms of the lien and compensate the plaintiff, or otherwise protect his interests. Petition Appendix C, page 19a J.A. 164

12. At no time after receipt of the notice of lien, did WMATA inform plaintiff before the disbursement of the settlement proceeds that they would not honor the attorney's lien. Plaintiff therefore relied, to his detriment, on WMATA's obligation under law to honor another attorney's lien. J.A. 162, 164

13. On May 28, 1992 plaintiff by letter requested that WMATA take the necessary steps to preserve plaintiff's lien. J.A. 213 On June 22, 1992 WMATA informed plaintiff, by letter, that it had intentionally refused to honor plaintiff's lien in violation of its own written policies. J.A. 214, 164

14. WMATA was well aware of its common law obligation under the attorney lien provision as evidenced by its policy of issuing settlement checks in the joint names of the claimant and the claimant's attorneys. J.A. 199, 214. In the case at bar, WMATA intentionally failed to include Plaintiff's name on the settlement checks in violation of its own policy. J.A. 164

Reasons For Granting the Petition

The Circuit Court decision conflicts with decisions[3] of the United States Supreme Court (including, *inter alia*, *Lapides v. Board of Regents*, 535 U.S. _____, 122 S.Ct. 1640 (2002), *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959), *Armstrong v. United States*, 364 U.S. 40 (1960) and *College Savings Bank v. Florida*, 527 U.S. 666 (1999) and consideration by this court is therefore necessary to secure and maintain uniformity of the court's decisions.

This proceeding involves a question of exceptional importance to wit: whether sovereign immunity under the eleventh amendment is a bar to a suit for just compensation for a taking under the fifth amendment.

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[3] The unanimous decision in *Lapides* is on all fours with the instant case because it involved waiver of sovereign immunity by act of removal of the case from state court. Similarly, Appellant WMATA removed this case from the Superior Court of the District of Columbia. *Armstrong* held Sovereign Immunity does not bar suit where government action destroys an equitable lien.

(1) The Circuit Court's Reversal of the District Court's Factual Finding on WMATA's claimed Sovereign Immunity Conflicts with Decisions of the United States Supreme Court and this Circuit.

The WMATA Compact contains a clear and unequivocal waiver of sovereign immunity. See Compact Section 12. At trial WMATA sought to rely on the *Governmental function* exception as contained in Compact Section 80, which states in relevant part as follows:

"The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent[s] committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules of conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function." (Emphasis added)

Though the Compact's use of the word any is clear and unequivocal the Circuit Court reversed the factual finding of the District Court. The United States Supreme Court has outlined the proper factual analysis to determine whether conduct falls within the scope of sovereign immunity under the *governmental function* exception. This Court stated that the exception covers *only acts that are discretionary in nature, acts that involve an element of judgment or choice. United States v. Gaubert*, 499 U.S. 315, at 322 (1991); *Berkovitz v. United States,* 486 U.S. 531, at 536 (1988). The requirement of choice or judgment is not satisfied if the law i.e., statute, regulation or policy prescribes the conduct. Here the District Court properly found that the District of Columbia common law and WMATA's own procedures prescribe the course of conduct for handling of attorney's

liens and that WMATA was aware of its obligation. J.A. 162 The Circuit Court itself has held that the *governmental function* sovereign immunity claim is a question of fact committed to the sound discretion of the District Court. *Beatty v. WMATA*, 860 F. 2d 1117, at 1127 (D.C. Cir 1988) see also *Souders v. WMATA*,48 F. 2d 546, at 548 (D.C. Cir. 1995); *Gillot v. WMATA*, 507 F. Supp. 454, at 457 (D. D.C. 1981). The Circuit Court's holding is in conflict with these cases. The District Court ruled that a matter of fact WMATA's action was a proprietary act.

The *Gaubert* Court found that proprietary acts (such as operating a lighthouse; driving a bus or placing one lawyer's name on a check rather than another) are not protected by sovereign immunity. See also WMATA Compact Section 80. As a matter of law each case turns on its own facts. On Appeal the district court's finding of fact must be upheld unless it is plainly erroneous. The Circuit Court, *sub silentio*, failed to give due deference to the district court's finding no *governmental function* in denying WMATA's motion for summary judgment and upholding Plaintiff's claim that waiver[4] was clear from the facts under WMATA's Compact. J.A. 50

Unequivocal waiver of sovereign immunity can also occur by various forms of litigation conduct by state officials. See, *College Savings Bank; Lapides* and *Petty, supra.* Contrary to the Circuit Court decision *sub judice* this has

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[4] That reading also runs counter to the settled principle that a provision limiting common law rights must be strictly construed, for "[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw v. Railroad Co.*, 101 U.S. 557, 565. (1880).

always been the law. *Humphrey v. Pegues*, 83 U.S.(16 Wall) 244 (1872); *Clark v. Barnard*, 108 U.S. 436 at 447 (1883); *Missouri v. Fiske*, 290 U.S. 18 at 24 (1933); *Gunter v. Atlantic Coast Line Rail Company*, 200 U.S. 273 at 284 (1906); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47 at 54 (1944). The Court in *College Savings Bank* emphasized that Eleventh Amendment immunity was a "personal privilege which [a state] may waive at [its] pleasure," *id* at 675 (quoting *Clark v. Barnard* at 447, *supra*). The Circuit Court decision is in direct conflict with *Wisconsin v. Schacht*, 524 U.S. at 389, where this Court made clear that immunity does not sufficiently resemble subject matter jurisdiction such that a court must address it *sua sponte*. See also *Idaho v. Couer d'Alene Tribe*, 521 U.S. 261, at 267 (1997), stating that the Eleventh Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction." The *Lapides* Court, building on the prior precedent, sought to make clear that litigation conduct could result in waiver of immunity. Here WMATA, perhaps not wishing as matter of trial strategy to address the holding of *District of Columbia Redevelopment Land Agency v. Dowdey*, 618 A.2d 133 (D.C. 1992), in Superior Court invoked federal jurisdiction by removal and thus completed waiver (the record reveals that WMATA did not plead sovereign immunity in its answer or amended answer).

(2) Sovereign Immunity does not Bar a Fifth Amendment Action for Destruction of an Equitable Lien

Plaintiff's lien was against the proceeds of the settlement issued by WMATA and not an attachment on government funds. Once WMATA destroyed the lien Plaintiff could only sue in tort for just compensation. Ms. Blocker

agreed to pay plaintiff one-third of the amount recovered, whether by way of settlement, judgment or otherwise. J.A. 184 Subsequently plaintiff was allowed to withdraw as Blocker's attorney, and he timely notified WMATA asserting his lien against the settlement check. J.A. 183, 189 With full knowledge of plaintiff's lien WMATA destroyed the lien and disbursed the settlement funds check to Mrs. Blocker protecting only new counsel. J.A. 191 On or about May 28, 1992 plaintiff wrote the defendant asking why WMATA failed to follow its own procedures and honor his attorney's lien. J.A. 213 On June 22, 1992 WMATA responded to plaintiff's letter stating the following:

> Once you withdrew your appearance as Ms. Blocker's counsel in this matter, Mr. Dulansey was required to negotiate any settlement with plaintiff through her new counsel, Ms. Rudd. By seeking to negotiate the most favorable settlement he could in this case for his client, he could not jeopardize the settlement by making it contingent on payment of your asserted lien or by adding your name to the settlement check. J.A. 214 (emphasis added)

The District Court properly found that WMATA's position was factually and legally erroneous. J.A. 164 Adding the attorney name(s) with an asserted lien(s) to the check was a proprietary or ministerial act required by WMATA procedures. Had WMATA timely informed Mr. Watters of its intention not to honor the lien, he could have intervened and asserted his lien before the court. However, WMATA did not inform the Court of the settlement or allow the District Court to resolve the matter by Interpleader. The existence of the lien at the time of settlement gave the plaintiff an interest in

the litigation and in the fund. As noted in *Elam v. Monarch Life Ins. Co.*, 598 A.2d 1167, 1172 (D.C. 1991), the attorney's charging lien attaches the moment the settlement is made between the parties. Thus, plaintiff's lien attached to proceeds at the time of settlement. WMATA was aware of this obligation under common law. J.A. 162 It is well established in this jurisdiction that an attorney has a lien upon the fund, settlement or judgment. In *DeWinter v. Thomas*, 34 D.C. App. 80,84 (1909), the District of Columbia Court of Appeals established the standard that must be applied to a lien based on a contract for services.

Thus, the contract which provided that plaintiff would receive one-third of the amount recovered whether by way of settlement, judgment or otherwise created a lien on the settlement funds[5] issued by defendant WMATA. Moreover, in *Pink v. Farrington*, 67 D.C. App. 314 (1937) the court held with respect to the law of the District of Columbia governing an attorney's lien:

> In the District of Columbia there is no statute, but the rule on the subject has been stated to be an indispensable condition to the establishment of an attorney's lien on a particular fund - <u>not in possession - that there should be a distinct appropriation of the fund by the client, or an agreement that the attorney should be paid out of it.</u> <u>This rule is now the</u>

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[5] At trial WMATA acknowledged that the *Res* had been destroyed and that Plaintiff had to proceed in equity. J.A. 51 A court of equity should do justice completely and not by halves, and should retain the cause for all purposes even though it be thereby called upon to determine legal rights otherwise beyond its authority. *Camp v. Boyd*, 229 U.S. 530, 551 (1913)

established law in this jurisdiction. 67 App. D.C. at 315 (Emphasis added).

The rule enunciated in *Pink*, supra, is well-established law. In *Wylie v. Coxe*, 15 How. (1853) 415, the United States Supreme Court determined that a contract for a contingency fee constituted a lien upon the fund at time the fund is created. See also *Ingersoll v. Coram*, 211 U.S. 335 (1908).

Thus, it is clear that an attorney has a lien against the fund obtained by his efforts, not against the government treasury. Petition Appendix C, page 19a It has also been established that the law recognizes the creation of a lien against the fund irrespective of the profession involved. (See *Wardman v. Leopold*, 85 F.2d 277 (D.C. Cir. 1936)). Destruction of that lien by the stakeholder has been a long recognized tort. The Supreme Court has held that sovereign immunity will not bar an action for destruction of an equitable lien[6]. *Armstrong v. United States*, *supra*. The existence of the lien at the time of settlement gave the plaintiff an interest in the litigation and in the fund. In *Elam v. Monarch Life Ins. Co.*, *supra*, the District of Columbia Court of Appeals recognized that the attorney's charging lien attaches the moment the settlement is made between the parties. Thus, plaintiff's lien attached to proceeds at the time of settlement. WMATA's collusive actions in breaching it's duty to enforce equitable lien was actionable under the Fifth Amendment. *Armstrong* is in conflict with the Circuit Court's finding.

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[6] But see the Circuit Court opine in conflict with this Court's decisions and inviting further Supreme Court review of *Lapides*. Petition Appendix B, page 11a footnote 13

(3) Defendant WMATA Is Liable Under Tort For The Amount of Plaintiff's Lien

The District Court found that the defendant, WMATA is liable in tort to Plaintiff for the amount of the attorney's lien. It is well established that where the attorney of record is discharged without cause, he has a personal financial interest in the cause of action and must be given an opportunity to intervene to protect his attorney's lien. (See *Friedman v. Harris*, 158 F.2d 187, 188 (D.C. Cir. 1946)). Petition Appendix C, page 20a J.A. 162 Furthermore an attorney is entitled to recover the full contingency fee when he has, before discharge, fully or substantially performed or contributed to the result finally obtained on the client's behalf. (See *Falcone v. Hall*, 235 F.2d 860, 862 (D.C. Cir. 1956). Plaintiff's entitlement to the fee from tortfeasor WMATA has been recognized by the District of Columbia Court of Appeals under similar facts. In *District of Columbia Redevelopment Land Agency v. Dowdey*, *supra*, the court recognized the obligation of R.L.A., a governmental entity created by statute as was WMATA:

> RLA's failure to join Dowdey deprived him of his rights to be paid for his attorney's lien. The consequences of a condemnor's failure to join a known interested party can result in double payment. *United States v. 88.28 Acres of Land*, 608 F.2d at 716. Barring some other viable bar to the claim, Dowdey is entitled to recover from RLA. 618 A.2d at 162. (Emphasis added)

Here plaintiff fully and substantially performed and/or contributed to the final result obtained on behalf of his client Ms. Blocker. Plaintiff was discharged without cause after the

defendants offered settlement and therefore had a personal interest in the litigation. (*Falcone v. Hall*, 235 F.2d 860, 862 (D.C. Cir. 1956); *Friedman v. Harris*, 158 F.2d 187, 188 (D.C. Cir. 1946)). WMATA, was clearly aware of the existence of plaintiff's equitable lien when it settled the case. WMATA was under a legal obligation to inform the District Court and/or plaintiff of the settlement. Petition Appendix C, page 18a. However, defendant sought instead to destroy plaintiff's lien by disbursing the protected funds of the case with full knowledge of the lien's existence. Under such circumstances the stakeholder is liable under tort to the attorney for the full amount of the lien. *Union Pac. R.R. Co. v. Laughlin*, 247 U.S. 204 (1918); (District Court opinion, citing 7 Am Jur 2A 348, Petition Appendix C page 20a); (Accord, *Greenberg v. Sher*, 367 A2d 882, 885 (D.C. App.. 1989); *Kaushiva v. Hutter*, 454 A.2d 1373, 1374-75 (D.C. 1983); *Sachs v. Klein*, 154 A.2d 134, 137 (D.C. 1959); *Dowdey v. R.L.A.*, 619 A.2d 153 (D.C. 1992). *See also*, Forkosch, *Prima Facie Tort* 42 Cornell Law Quarterly 465 (1957) and Halpern, *Intentional Torts and the Restatement* 7 Buffalo Law Review 7 (1957). Both articles discuss the tort of contractual interference. The collusive conduct of WMATA here and as described in *Sachs v. Klein* has also been deemed the tort of misfeasance. See *Prosser on Torts* 4th ed. 616 *Misfeasance*.

Under the common law in the District of Columbia, an attorney's lien cannot be destroyed once notice has been given to the defendant (see, District Court's opinion citing 7 Am. Jur. 2d 348, Petition Appendix C, page 20a). The defendant's tortious actions (a taking under the fifth amendment) deprived plaintiff of his right to be paid under his attorney's lien. Thus, plaintiff is entitled to recovery of the full amount plus interest of the attorney's lien from WMATA. *Travelers Ins. Co. v. Haden* 418 A. 2d 1078, 1081 (D.C.

1980); *WMATA v. Reid*, 666 A. 2d 41, 44 (D.C. 1995) See also *Armstrong v. United States*, *supra*.

Wherefore, based upon the foregoing the plaintiff prays that this Court grant a Writ of Certiorari and direct the Circuit Court to enter Summary Affirmance of the Judgment entered by the District Court. (*See* Order 01-1079 *Montgomery v. Maryland* issued May 20, 2002 Order List 535) The Circuit Court's opine is in conflict with the law of the Circuit, the States and the Supreme Court and deprives future equitable lien holders of just compensation under the Fifth Amendment.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-7092

[Filed August 6, 2002]

Keith Winston Watters, t/a Keith Watters and Associates, Appellee	)
v.	)
Washington Metropolitan Area Transit Authority, Appellant,	)
Brenda Blocker, Appellee.	)

BEFORE: Ginsburg, Chief Judge, Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges, and Williams, Senior Circuit Judge.

ORDER

Upon consideration of appellee's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:

Michael C. McGrail
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-7092

[February 7, 2002, Argued
July 12, 2002, Decided]

KEITH WINSTON WATTERS, APPELLEE	)
v.	)
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, APPELLANT	)
BRENDA BLOCKER, THIRD-PARTY DEFENDANT-APPELLEE	)

Appeal from the United States District Court
for the District of Columbia
(No. 93cv01434)

JUDGES:
Before: TATEL and GARLAND, Circuit Judges, and WILLIAMS, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge GARLAND.

OPINION

GARLAND, *Circuit Judge*: Keith Watters, an attorney, brought suit against the Washington Metropolitan Area Transit Authority (WMATA) for failing to honor an attorney's lien on the proceeds of a settlement between WMATA and Watters' former client. We hold that WMATA's sovereign immunity bars Watters' lawsuit.

I

Approximately ten years ago, Watters represented Brenda Blocker in a personal injury action against WMATA in the District of Columbia. Under the retainer agreement signed by Blocker, Watters was entitled to 33.3% of any recovery obtained in the case. After three and a half years of investigation and settlement negotiations, Blocker, apparently dissatisfied with the $55,000 compromise then under discussion between Watters and WMATA, discharged Watters. That same day, February 19, 1992, Blocker retained Bonita Rudd as her new attorney. On February 26, Watters sent WMATA a letter asserting an attorney's lien, in the amount of one-third of $55,000, on any recovery Blocker might obtain from the Authority. WMATA did not respond. Rudd settled Blocker's case for $60,000 on April 3, 1992, and WMATA, disregarding Watters' purported lien, paid the full amount to Blocker and Rudd.

Watters brought the instant suit against WMATA for breach of contract and "breach of duty to enforce equitable lien." Compl. at 5. The district court dismissed Watters' breach of contract claim, but after a trial found WMATA liable for failing to honor Watters' lien. WMATA appeals

from the judgment against it.[1]

II

On appeal, WMATA contends that sovereign immunity precludes Watters from asserting or enforcing an attorney's lien against funds in its possession.[2] WMATA was created by an interstate compact entered into by the District of Columbia and the states of Maryland and Virginia.[3] As we have repeatedly held, the three signatories conferred each of their respective sovereign immunities, including the Eleventh

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[1] WMATA also filed a third-party complaint against Blocker and Rudd, which the district court dismissed. WMATA appeals that dismissal as well, but our determination that WMATA is immune from liability to Watters moots the Authority's third-party claim.

[2] WMATA did not raise this defense in its answer to Watters' complaint, but did raise it both in subsequent filings in the district court and in its opening brief in this court. Sovereign immunity is a jurisdictional issue that may be raised at any time during the course of litigation. *Burkhart v. Washington Metro. Area Transit Auth.*, 324 U.S. App. D.C. 241, 112 F.3d 1207, 1216 (D.C. Cir. 1997).

[3] On November 6, 1966, Congress consented to the WMATA Compact and enacted it for the District of Columbia. Washington Metro. Area Transit Auth. Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966). The Compact is codified at D.C. Code § 9-1107.01; Md. Code, Transp. § 10-204; and Va. Code § § 56-529,-530.

Amendment immunity of the two states, upon the Authority.[4]

There is no question that the three signatories' sovereign immunity extends to suits for breach of attorney's liens. The Eleventh Amendment gives the two states immunity from suit in federal court, *see California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501-02, 140 L. Ed. 2d 626, 118 S. Ct. 1464 (1998), and judicial decisions in all three jurisdictions indicate that each has sovereign immunity against the imposition and enforcement of equitable liens (and against related devices like garnishment[5]) in their own courts as well.[6]

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[4] *See, e.g., Jones v. Washington Metro. Area Transit Auth.*, 340 U.S. App. D.C. 320, 205 F.3d 428, 432 (D.C. Cir. 2000); *Beebe v. Washington Metro. Area Transit Auth.*, 327 U.S. App. D.C. 171, 129 F.3d 1283, 1287 (D.C. Cir. 1997); *Sanders v. Washington Metro. Area Transit Auth.*, 260 U.S. App. D.C. 359, 819 F.2d 1151, 1154 (D.C. Cir. 1987); *Morris v. Washington Metro. Area Transit Auth.*, 251 U.S. App. D.C. 42, 781 F.2d 218, 224-25 (D.C. Cir. 1986).

[5] To "garnish" is to attach property (often wages) of a debtor that is in the possession of a third party in order to satisfy a debt. BLACK'S LAW DICTIONARY 689 (7th ed. 1999). *See Knight v. United States*, 982 F.2d 1573, 1578 (Fed. Cir. 1993) (holding that "unless the United States has submitted itself to such state law, an attorney lien statute, like a state garnishment statute, has no force or effect against it and places no restraints on the government's payment of its obligations to another, including the payment of wages").

[6] *See Grunley Constr. Co. v. District of Columbia*, 704 A.2d 288, 290 (D.C. 1997) (garnishment); *Chewning v. District of Columbia*, 73 App. D.C. 392, 119 F.2d 459, 460 (D.C. Cir. 1941) (garnishment); *Mayor of Baltimore v. Hooper*, 312 Md. 378, 539

Thus, unless WMATA's sovereign immunity has been waived, the district court lacks jurisdiction to enter a judgment against the Authority. *See Burkhart v. Washington Metro. Area Transit Auth.*, 324 U.S. App. D.C. 241, 112 F.3d 1207, 1216 (D.C. Cir. 1997) (noting that "sovereign immunity claims are jurisdictional").

We may find a waiver of sovereign immunity "only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Morris v. Washington Metro. Area Transit Auth.*, 251 U.S. App. D.C. 42, 781 F.2d 218, 221 (D.C. Cir. 1986) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974) (internal quotation marks and alteration omitted)); *see Lizzi v. Alexander*, 255 F.3d 128, 133 (4th Cir. 2001) (requiring "clear and unequivocal" waiver of WMATA's

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A.2d 1130, 1132 (Md. 1988) (holding, "upon considerations of public policy" rather than sovereign immunity, that municipal corporations are not amenable to garnishment); *Kator, Scott, & Heller, PC v. Landsidle*, 1994 Va. Cir. LEXIS 152, 35 Va. Cir. 107, 1994 WL 1031399, at *2 (Va. Cir. Ct. 1994) (attorney's equitable claim against settlement fund); *Slaughter v. Winston*, 347 F. Supp. 1221, 1222-23 (E.D. Va. 1972) (garnishment); *Phillips v. Rector of Univ. of Va.*, 97 Va. 472, 34 S.E. 66 (Va. 1899) (mechanic's lien); *see also Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 264, 142 L. Ed. 2d 718, 119 S. Ct. 687 (1999) (noting that "sovereign immunity bars creditors from attaching or garnishing funds in the Treasury, or enforcing liens against property owned by the United States" (citations omitted)); *Knight v. United States*, 982 F.2d 1573, 1578-79 (Fed. Cir. 1993) (holding that sovereign immunity bars an attorney's lien against the United States).

immunity). We find nothing to indicate such a waiver of WMATA's immunity against a suit for breach of duty to enforce an attorney's lien.

Although the WMATA Compact provides that WMATA may "sue and be sued," Compact § 12(a), we have held that provision to extend only as far as the more specific (and partial) waiver of sovereign immunity contained in section 80 of the Compact. *Morris*, 781 F.2d at 221 n.3; *accord Lizzi*, 255 F.3d at 133-34. Section 80 provides, in relevant part, as follows:

> The Authority shall be liable *for its contracts and for its torts* and those of its Directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function.

Compact § 80 (emphasis added). This section falls far short of a clear and unequivocal waiver of WMATA's immunity against attorney's charging liens. On its face, section 80 makes no reference to liens or their enforcement, nor is there any implication in its text that the Authority's funds may be made subject to equitable liens of any sort. In the District of Columbia,[7] an attorney's lien against funds held

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[7] We look to District of Columbia law to define the nature of Watters' claim, because the District is where the obligation (to pay attorney's fees) that generated the lien arose, and section 80 of the Compact provides that WMATA is liable "in accordance with the law of the applicable signatory." *See Belton v. Washington*

by a third party (like WMATA) is not a contract with, or tort of, the third party, but rather is a "qualified right of property which a creditor has in or over specific property of his debtor, as security for the debt." *Wolf v. Sherman,* 682 A.2d 194, 196-97 (internal quotation marks and alteration omitted).[8] The District does not have a statute that authorizes the imposition of an attorney's lien; such a lien is an equitable device that "arises when an attorney obtains a judgment [or settlement] for a client, and ... [is] merely a claim to ... equitable interference by the court to have that judgment [or settlement] held as security for ... the attorney's charges against the client." *Id.* at 197 (internal quotation marks and alteration omitted); *see Elam v. Monarch Life Ins. Co.*, 598 A.2d 1167, 1171 (D.C. 1991).

Watters contended at oral argument that the *breach* of an attorney's lien constitutes a tort, and is thus covered by section 80's waiver of sovereign immunity for torts committed

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Metro. Area Transit Auth., 305 U.S. App. D.C. 333, 20 F.3d 1197, 1199 n.1 (D.C. Cir. 1994).

[8] *See also Blue Fox*, 525 U.S. at 262-63 ("An equitable lien ... merely grants a plaintiff 'a security interest in the property, which [the plaintiff] can then use to satisfy a money claim' " (quoting DAN B. DOBBS, LAW OF REMEDIES § 4.3(3), at 601 (2d ed. 1993))); BLACK'S LAW DICTIONARY 933 (7th ed. 1999) (defining "attorney's lien" as "the right of an attorney ... to encumber money payable to the client ... until the attorney's fees have been properly determined and paid"). In *Grunley Construction Co.*, the District of Columbia Court of Appeals held that the District was immune from garnishment notwithstanding a statute that expressly waived sovereign immunity as a defense to a suit on a contract. 704 A.2d at 290.

by the Authority.[9] But even if that contention were correct,[10] it begs the question of whether Watters could have placed a lien on WMATA's property in the first place. As we have noted above, the case law of the three signatories indicates that he could not have. *See supra* note 6 and accompanying text.

Our conclusion that WMATA is immune from the imposition or enforcement of an attorney's lien is bolstered by the same considerations that have led the courts to hold that public funds are generally immune from equitable liens and garnishments unless expressly permitted by statute. As the District of Columbia Court of Appeals declared in *Grunley Construction Co. v. District of Columbia, "The policy behind the rule is manifest: the day-to-day fiscal integrity of local government could not be maintained if judgment creditors could seize funds that have been earmarked for other*

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[9] Although Watters failed to file a brief in this court, we permitted his counsel to address the sovereign immunity issue at oral argument. *See* Fed. R. App. P. 31(c).

[10] In *Blue Fox*, the Supreme Court suggested that a suit to enforce an equitable lien does not come within the Federal Tort Claims Act, which waives the federal government's immunity for "tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674; *see Blue Fox*, 525 U.S. at 260 n.3. We have not found a District of Columbia case that discusses the proper classification of an attorney's claim against a third party for breach of an attorney's lien.

purposes." 704 A.2d 288, 290 (D.C. 1997).[11] A lien of the kind Watters seeks to enforce would have the same impact on the public fisc.[12] Accordingly, we will not assume that the Compact's signatories intended to waive WMATA's immunity from the imposition or enforcement of such liens absent a clear and unequivocal expression of their intent to waive. Finding no such expression, we conclude that Watters' action is barred by WMATA's sovereign immunity.[13]

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[11] *See Buchanan v. Alexander*, 45 U.S. 20, 20, 11 L. Ed. 857 (1846) (noting that "the funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended," and holding that the United States is therefore immune from writs of attachment against seamen's wages); *Hooper*, 539 A.2d at 1132 ("The policy of the law which prevents the laying of attachments in the hands of public officials seeks to prevent inconvenience and the disruption of public affairs." (internal quotation marks omitted)).

[12] As the Supreme Court noted in *Hess v. Port Authority Trans- Hudson Corp., WMATA is "an enterprise constantly dependent on funds from the participating governments to meet its sizable operating deficits."* 513 U.S. 30, 49, 130 L. Ed. 2d 245, 115 S. Ct. 394 (1994) (citing *Morris*, 781 F.2d at 225-27). The " 'agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries.' " *Id.* (quoting *Morris*, 781 F.2d 218 at 227).

[13] This case was originally filed by Watters in the Superior Court of the District of Columbia, and then removed to federal court by WMATA. After we heard oral argument, the Supreme Court held, in *Lapides v. Board of Regents*, 152 L. Ed. 2d 806, 122 S. Ct. 1640 (2002), that when a state has waived sovereign immunity on a state-law claim in its own courts, it waives

III

For the foregoing reasons, we conclude that WMATA is shielded by sovereign immunity from Watters' suit for breach of duty to enforce an attorney's lien. As a consequence, the district court is without jurisdiction to grant him the recovery he seeks. We therefore vacate the judgment of the district court, and remand with instructions to dismiss this case for lack of jurisdiction.

Vacated and remanded.

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its Eleventh Amendment immunity by removing that claim to federal court. As the WMATA signatories have not waived immunity from attorney's liens in their own courts, the narrow holding of *Lapides* does not apply to this case. Even if it did, it would not be controlling because WMATA's immunity does not arise solely from the Eleventh Amendment. In any event, Watters has never argued that WMATA waived its immunity (Eleventh Amendment or otherwise) by removing this case to federal court. Unlike the defense of sovereign immunity, which is jurisdictional and may be raised at any time, the claim that WMATA waived its immunity is an argument that must be raised in a timely fashion. *Cf. Whelan v. Abell*, 310 U.S. App. D.C. 396, 48 F.3d 1247, 1250-51 (D.C. Cir. 1995) (holding that appellant waived its claim that its opponent had waived the protections of the *Noerr-Pennington* doctrine by failing to assert the opponent's waiver); *Belton*, 20 F.3d at 1202 (holding that a party may waive its opponent's waiver of an argument by not raising it on appeal). And we see no reason to consider, sua sponte, an issue upon which neither this circuit nor the Supreme Court has yet opined.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

C.A. No. 93-1434 (WBB)

[Filed May 4, 2001]

KEITH WATTERS,
Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant/Third-Party Plaintiff,

v.

BRENDA BLOCKER and BONITA RUDD,
Third-Party Defendants.

MEMORANDUM

In the matter before the Court, Keith Watters ("Plaintiff") filed suit against Washington Metropolitan Area Transit Authority ("Defendant") for breach of duty to enforce an equitable lien. After Plaintiff's complaint was filed, Defendant filed a third-party complaint against Brenda

Blocker ("Ms. Blocker") and Bonita Rudd ("Ms. Rudd") for contribution and indemnification. The court held a one-day bench trial in this matter on August 5, 1998. Upon review of these proceedings, the Court finds that Defendant did breach its duty to enforce an equitable lien, and also finds that there is no merit to Defendant's claims for contribution or indemnification from Ms. Blocker or Ms. Rudd.

I. Factual Background

Plaintiff was retained as legal counsel for Ms. Blocker on September 7, 1988, in order to represent her in a personal injury suit against Defendant. (*Blocker v. WMATA*, C.A. No. 90-1132). At the time that he was retained, Plaintiff had known Ms. Blocker for several years and previously had represented her in other legal matters. When she retained Plaintiff as counsel, Ms, Blocker signed a Retainer Agreement which stated that "... Client promises to pay, and hereby assigns, to Attorney a fee equal to Thirty-Three and One-Third percent (33.3%) of the total amount recovered, whether by way of settlement, judgment, or otherwise..." (Pl.'s Ex. 1 Mot. Summ. J.)

Plaintiff then filed suit against Defendant on behalf of Ms. Blocker, working diligently and competently in an effort to represent her best interests. During the three and a half years that he was retained by Ms. Blocker, Plaintiff investigated the events leading up to her complaint; solicited and obtained medical records; developed interrogatories and requested the production of documents; assisted Ms. Blocker in response to interrogatories; attended depositions, status conferences and settlement negotiations; and kept Ms. Blocker fully apprised of the status of settlement discussions

with Defendant.

In a settlement conference before Magistrate Judge Alan Kay, Defendant's counsel, David Dulansey ("Mr. Dulansey"), offered $55,000 as a settlement amount. Plaintiff communicated this amount to Ms. Blocker, who rejected the offer. On February 19, 1992, Ms. Blocker discharged Plaintiff as her attorney. Ms. Blocker did not have any specific complaints about Plaintiff's representation of her in her lawsuit against Defendant. However, Ms. Blocker did not like that she was excluded from the settlement conference held by Magistrate Judge Kay, which was held under customary procedures. In addition, Ms. Blocker expressed dissatisfaction with the $55,000 settlement offer, with the belief that her compensation from Defendant should be a great deal more.

On the same day that she discharged Plaintiff as her attorney, Ms. Blocker retained Ms. Rudd to represent her. Ms. Rudd and Ms. Blocker agreed to a one-third contingency fee payment similar to the Retainer Agreement between Ms. Blocker and Plaintiff. Ms. Rudd called the Plaintiff to request Ms. Blocker's file and to offer him $5,000 in compensation for his prior work on Ms. Blocker's case, Plaintiff rejected Ms. Rudd's offer. On February 25, 1992, Plaintiff filed a motion to withdraw with the court.

On February 26, 1998, Plaintiff sent a letter to the Defendant stating that based on his considerable pre-trial and pre-suit effort, he was asserting an attorney's lien in the amount of one-third of $55,000, the recommended settlement figure that Defendant offered at the conference before Magistrate Judge Kay. In the February 26 letter, Plaintiff

requested that Defendant contact him if there were any questions regarding his lien. Mr. Dulansey, Defendant's counsel, showed Plaintiff's February 26 letter to his supervisors and they instructed him not to respond to the letter. Defendant did not respond to Plaintiff's February 26 letter.

On March 4, 1992, Magistrate Judge Kay granted Plaintiff's motion to withdraw his appearance from the case. On April 3, 1992, less than two months after taking over the case, Ms. Rudd received a letter from Defendant confirming settlement of Ms. Blocker's case for $60,000. Without Plaintiff's knowledge, a praecipe of dismissal was filed with the court on April 20, 1992. Defendant issued a settlement check for $60,000 in the names of Ms. Blocker and Ms. Rudd on April 21, 1992.

On April 27, 1998, Ms. Blocker signed a Release Agreement in favor of Defendant in which she agreed to "remise, release and forever discharge the Washington Metropolitan Area Transit Authority, its successors, assigns, and employees, of and from all actions and demands whatsoever both in law and in equity." (Release Agreement, Def's Ex. 1.) The Release Agreement did not implicitly or explicitly indicate any obligation on the part of Ms. Blocker to indemnify the Defendant for any claims brought against the Defendant by anyone other than Ms. Blocker, her heirs, executors, or administrators.

On May 28, 1992, Plaintiff sent another letter to Defendant stating that he had spoken with Defendant's General Counsel's office on May 18, 1992, and had been informed that the case had been settled and that his lien would

not be honored. Plaintiff requested that Defendant explain why it had not informed Plaintiff of its position regarding his lien prior to settlement of the case.

In a letter to Plaintiff dated June 22, 1992, Defendant asserted that it had forwarded a copy of Plaintiff's February 26 letter to Ms. Rudd, and had assumed that Plaintiff had placed Ms. Rudd on notice of his lien. Defendant also noted that its counsel did not want to run the risk of jeopardizing its settlement with Ms. Blocker "by making it contingent on payment of [Plaintiff's] asserted lien or by adding [Plaintiff's] name to the settlement check." (Pl.'s Ex. 4 Mot. Summary J.) Finally, Defendant maintained that it was not its policy to become involved in payment disputes between an attorney and a client.

On June 17, 1993, Plaintiff filed the present suit in Superior Court for the District of Columbia seeking compensation for Defendant's failure to properly honor his attorney's lien for the equivalent amount of one-third of the settlement. On July 13, 1993, Defendant removed the case to federal court and filed a third-party complaint against Ms. Blocker and Ms. Rudd for indemnification or contribution.

II. Analysis

It has been established in this jurisdiction that when a person who has retained a lawyer and agreed to pay a specified fee for services discharges him without cause, such lawyer has a right to recover compensation for services rendered. *Green v. Fireison & Associates*, 618 A.2d 185, 190 (D.C. 1992). Moreover, District of Columbia courts have clarified that "substantial performance by such lawyer entitles

him to recover his agreed upon contingent fee even though the final recovery is brought about by successor counsel." *Id.*; *citing Kaushiva v. Hutter*, 454 A.2d 1373, 1374 (D.C.), *cert. denied.*, 464 U.S. 820 (1983); *Greenberg v. Sher*, 567 A.2d 882 (D.C. 1989) (upholding award of one third of total settlement amount in attorney's fees for dismissed attorney's substantial performance of work toward final judgment). As happens frequently in the law, the relevant case law is merely affirming what the Court would have already recognized as the most fair outcome. Plaintiff contributed a great deal to what became the final settlement in Ms. Blocker's case. Therefore, there is no question that Plaintiff should be awarded just compensation for his efforts.

A. Defendant's Alleged Breach of Duty to Enforce an Equitable Attorney's Lien[1]

Plaintiff asserts that Defendant is liable for breach of duty to enforce an equitable lien because although it received timely notice of his attorney's lien, it failed to honor the lien, otherwise protect the proceeds of the settlement, or timely inform Plaintiff that it would not honor his lien. Plaintiff has established that Defendant intentionally failed to notify Plaintiff of its intent to disregard his attorney's lien and

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[1] Count One of the Plaintiffs Complaint, Breach of Contract, was based on the Plaintiff's contingency fee agreement with Ms. Blocker. In Count One, Plaintiff asserted that the Defendant should be held liable for breach of the contingency fee agreement. This claim was dismissed by the Court before the start of trial. Thus, Count Two of Plaintiff's Complaint, Breach of Duty to Enforce Equitable Lien, is the sole claim Plaintiff has before this Court.

intentionally settled the case before Plaintiff could take formal measures to protect his lien.

The existence and effect of an attorney's lien is governed by the law of the place in which the contract between the attorney and the client is to be performed. *Democratic Central Cmte. of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 941 F.2d 1217, 1219 (D.C. Cir. 1991). The District of Columbia does not have a statute creating charging liens for attorneys, but it does recognize a common law lien. *Monarch Life Insurance Company v. Elam*, 918 F.2d 201 (D.C. Cir. 1990) (citations omitted). At common law, a contingent fee agreement between an attorney and his client which assesses contingent compensation at a sum equal to a portion of any recovery on the client's cause of action can create an attorney's charging lien on funds recovered. *Elam v. Monarch Life Insurance Co.*, 598 A.2d 1167 (D.C. 1991), The District of Columbia's rule on charging liens states that in order for such a lien to attach in this jurisdiction, "it is indispensable that there exist between the client and his attorney an agreement from which the conclusion *may reasonably be reached* that they contracted with the understanding that the attorney's charges were to be paid out of the judgment recovered." *Wolf v. Sherman*, 682 A.2d 194 (D.C. 1996) (*citing Elam*, 598 A.2d 1169) (emphasis in original). In the present case, the Retainer Agreement was very explicit regarding payment to Plaintiff upon recovery or settlement.

Once established, a charging lien gives an attorney the right to recover costs or fees and to have the court interfere to prevent or set aside settlements which disregard his entitlement. *See Elam* at 1169. Where an attorney seeks to

recover on an alleged charging lien, the attorney may intervene in the underlying proceedings to prevent disbursement of settlement funds or a judgment in disregard of his claim. *See eg, Falcone v. Hall* 235 F.2d 860, 862 (D.C. Cir. 1956) (stating "in a proper case an attorney may apply to the court in his own name, assert his interest and lien, and secure enforcement, to the extent necessary to satisfy a valid claim for compensation, of a judgment favorable to his client."); *Friedman v. Harris*, 158 F.2d 187 (D.C. Cir. 1946); *Greenberg v. Sher*, 567 A.2d 882 (D.C. 1989).

Once he has received notice of an attorney's lien, a defendant is not under any affirmative duty to protect such lien, as by a suit to litigate its existence and validity, where, before paying the amount agreed to in the settlement, *he informs the attorney of the fact of settlement and judgment thereon and notifies him to take steps to protect his lien.* 7 Am. Jur. 2d Attorneys at Law § 366 (1997) (emphasis added), However, an attorney may hold a defendant responsible if the defendant knowingly pays the client and frustrates the collection of the attorney's fee. *Id.*

In a situation like the present one, there was not a large burden on Defendant. Once it received notice of the lien from Plaintiff, it merely had to notify Plaintiff about the settlement, thus providing Plaintiff the opportunity to intervene in the lawsuit and seek his fees from the Court. However, although Defendant received Plaintiff's letter almost two months before the settlement was finalized, it did not respond to Plaintiff until after the settlement check was sent to Ms. Blocker and Ms. Rudd. Plaintiff did not have a chance to file any pleadings or other documents with the court

requesting recognition or protection of his claim. Moreover, as stated *supra*, Defendant intentionally decided against contacting Plaintiff regarding this case, due to fears that such contact might "jeopardize the settlement." (Pl.'s Ex. 4 Mot. Summary J.) Only after the case had been settled, and the funds disbursed, did the Defendant finally respond to the Plaintiff's inquiries. Because Defendant, on notice of Plaintiff's attorney's lien, knowingly paid Ms. Blocker and Ms. Rudd and thus frustrated Plaintiff's collection of his attorney's fees, the Court will enter judgment for Plaintiff.

B. Third-Party Complaint for Indemnification or Contribution

AE the same time, Defendant brings a third-party complaint against Ms. Blocker and Ms. Rudd pursuant to Rule 14(a) of the Federal Rules of Civil Procedure. Defendant asserts that if it is found to be liable to Plaintiff based on an attorney's lien, it is entitled to contribution or indemnification from Ms, Blocker and Ms. Rudd. However, Defendant has failed to establish any substantive basis for establishing any liability to it from Ms. Blocker or Ms. Rudd. Defendant argues that contribution or indemnification from Ms. Blocker is based on Ms Blocker's Release Agreement. Defendant also alleges that it is entitled to contribution or indemnification from Ms. Rudd for her role as successor attorney of record for Ms. Blocker and as disbursing agent of the settlement funds. As discussed *infra*, neither of these assertions have merit.

Rule 14(a) allows a defending party to bring a third-party complaint against a person "*who is or may be liable to the third party plaintiff* for all or part of the plaintiff's claim

against the third party plaintiff." Fed. R. Cir. P. 14(a) (emphasis added). Under Rule 14(a), a defendant may not implead a party under Rule 14(a) who is solely liable to the original plaintiff but who is not liable to the defendant. While such procedure was possible at one point, in 1946, Congress amended Rule 14 to eliminate the ability of a defendant to implead a party who is or may be liable to plaintiff. *See* Advisory Committee Notes to Rule 14. Therefore, a defendant cannot force a plaintiff who has sued him to also sue another third party that may be directly liable to plaintiff, *See id.* For in doing so, impleader would "amount[] to no more than a mere offer of a party to the plaintiff, and if he rejects it, the attempt is a time-consuming futility." Rule 14, Advisory Committee Notes, 1946 Amendment.

Therefore, Defendant cannot bring a third-party complaint against Ms. Blocker and Ms. Rudd based on any alleged duty that either has to Plaintiff. Nor can Defendant escape liability to Plaintiff by arguing that even if it is liable, Ms. Blocker and Ms. Rudd are liable, too. *See* Notes, Federal Rules of Civil Procedure, Rule 14, *citing Gartner v. Lombard*, 197 F.2d 53 (3d Cir. 1952). In order to proceed with its third-party complaint, Defendant must identify some independent obligation that Ms. Blocker and Ms. Rudd have to Defendant.

In an attempt to demonstrate such liability from Ms. Blocker, Defendant asserts that the payment of $60,000 to Ms. Blocker, coupled with her Release Agreement, created a contractual relationship supporting indemnification. This contention is unpersuasive. Indemnity agreements are rarely implied and are always to be strictly construed. There is no duty "to indemnify unless it is plainly spelled out in the

contract." *See American Building Maintenance Company v. L'Enfant Plaza Properties*, 655 A.2d 858, 861 (D.C. 1995) (internal quotation marks and citations omitted). The Release Agreement cannot be construed as an indemnity agreement for a suit brought by Plaintiff against Defendant. Under the Release Agreement, Ms. Blocker, her heirs, executors or administrators had a duty not to bring a suit against Defendant for any action arising out ofthe underlying ease of *Blocker v. WMATA* Ms. Blocker has not breached her duty under the Release Agreement. Neither she nor her heirs, executors or administrators have brought suit against Defendant. Defendant has failed to establish a cause of action against Ms. Blocker. In addition, Defendant also attempts to find that Ms. Rudd is liable to it based upon her role as successor attorney and disbursing agent tbr the settlement funds. However, this duty, if found, would be to Plaintiff, not to Defendant. Therefore, the Court finds this argument to be unpersuasive as well. Upon consideration of Defendant's third party complaint, the Court finds in favor of Ms. Blocker and Ms. Rudd.

/s/ _____
William B. Bryant
Senior United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA.

C.A. No. 93-1434 (WBB)

[Filed May 4, 2001]

KEITH WATTERS,
Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant/Third-Party Plaintiff,

v.

BRENDA BLOCKER and BONITA RUDD,
Third-Party Defendants.

ORDER

This case having been tried by the Court, it is hereby ORDERED that Judgment shall be entered for the Plaintiff as to his Complaint for Breach of Duty to Enforce Equitable Lien; and it is

FURTHER ORDERED that Judgment shall be entered for the Third-Party Defendants as to the Third-Party Complaint; and it is

FURTHER ORDERED that the parties shall confer within fourteen days regarding the apportionment of costs pursuant to Rule 54(d) of the Federal Rules of Civil Procedure arid Rule 54.1 of the Rules of the United States District Court for the District of Columbia.

/s/ _____
William B. Bryant
Senior United States District Judge